

BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY

IN THE MATTER OF OFFICE OF ADMINISTRATIVE HEARINGS CASE NOS.  
772-2015 & 773-2015:

ERICKA RICHER,	)	HRB Case Nos. 0141016880 &
	)	0141016977
Charging Party,	)	
	)	
vs.	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
	)	ADMINISTRATIVE DECISION
BIG SKY SIDING & HOMES AND MIKE	)	
HUGHES,	)	
	)	
Respondents.	)	

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I. PROCEDURE AND PRELIMINARY MATTERS

Ericka Richer brought this complaint alleging Big Sky Siding and Homes (BSSH) and Mike Hughes discriminated against her on the basis of gender by subjecting her to a hostile work environment from August 2012 through January 2014 and retaliated against her by laying her off and failing to rehire her for the construction season beginning in March 2014.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on April 29 and April 30, 2015 in Helena, Montana. The second day of hearing was delayed due to an emergency involving one of the parties. The hearing was reconvened on May 12 and May 13, 2015 in Helena. Attorneys Tara A. Harris and Hollie D. Lund, Ph.D., represented Richer. Attorney Christopher K. Oliviera represented BSSH and Hughes.

At hearing, Richer, Mike Richer, Lynne Johnson, Erin Eastep, Rejus "R.J." Farrell, Mike Hughes, and Eddie Reed testified under oath. Charging Party's Exhibits 1 through 10 and Respondent's Exhibits 101 through 103; 105; 108 through 110; 116; and 117 were admitted into evidence.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Office of Administrative Hearings on June 17, 2015. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

## II. ISSUES

1. Did Big Sky Siding & Homes and/or Mike Hughes discriminate against Ericka Richer based upon sex by creating a hostile work environment, in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. Did Big Sky Siding & Homes and/or Mike Hughes retaliate against Ericka Richer by laying her off in January 2014 and not recalling her to work when other workers were recalled to full-time work?

3. If Big Sky Siding & Homes and/or Mike Hughes did illegally discriminate and/or retaliate against Ericka Richer as alleged, what harm, if any, did she sustain as a result and what reasonable measures should the department order to rectify such harm?

4. If Big Sky Siding & Homes and/or Mike Hughes did illegally discriminate and/or retaliate against Ericka Richer as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

## III. FINDINGS OF FACT

1. Express Employment Professionals (Express) is a temporary staffing service. Express's corporate office is located in Oklahoma City, Oklahoma.

2. Express places workers, referred to as associates, on temporary and temporary-to-permanent assignments based upon the associate's skill set and the business needs of its client companies.

3. Express pays the associate his or her wages; pays for workers' compensation insurance and unemployment insurance; and, at the end of the year, issues a W-2 form to the associate.

4. Lynne Johnson has owned and operated the Express franchise in Helena, Montana, for approximately 27 years. Erin Eastep has worked as the Office Manager for Express since approximately January 2014.

5. Express provides new associates with a handbook that outlines the rights and responsibilities of the associate, Express, and Express's client company. Associates are required to sign the back page of the handbook to verify they have read and understood the handbook.

6. Express also shows new associates how to complete their timecard, which is a carbon paper form that produces copies for the associate, Express, and Express's client company. The timecard includes an Associate Notice above the associate signature line that states:

"I certify, through my signature below, that I have worked the hours listed on this timecard and that the hours reflected are true and accurate. I further acknowledge that I have not been denied any required meals and rest breaks during this pay period. [If?] I did not receive any required meals and rest breaks during this pay period, I agree that I will immediately notify my Express Staffing Consultant verbally and in writing. In addition, while on assignment, I have not had any work related injuries or illnesses nor have I been subject to any workplace discrimination or harassment."

7. Johnson has placed temporary workers on assignments with Mike Hughes, who is a shareholder in WIM Corporation (WIM), under a written agreement, for several years.

8. WIM builds and sells residential homes throughout Helena and Butte. WIM contracts with various subcontractors to build residential homes. WIM operates on a pre-sale basis and uses its own cash to finance projects. WIM has no employees. Hughes has no employees.

9. WIM is not named as a defendant/respondent in this case.

10. Hughes has worked closely with Eddie Reed, who owns and operates Big Sky Siding and Homes (BSSH), for several years. Hughes and Reed are personal friends.

11. Express has also placed associates on temporary assignments with BSSH, under a written agreement, for several years.

12. BSSH was the Primary Subcontractor of WIM in 2012 and 2013. BSSH and WIM, as the General Contractor, executed written subcontractor agreements in December 2012 and December 2013.

13. Reed subcontracted with Rejus Construction, which is owned and operated by Rejus "R.J." Farrell, in December 2012 and December 2013. Hughes approved both contracts as the General Contractor.

14. Farrell (or his business entity) is not named as a defendant/respondent in this case.

15. Neither WIM nor BSSH have any policies or procedures in their Articles of Incorporation or Bylaws governing how a complaint by a temporary employee is to be handled. Neither WIM nor BSSH have any procedures on how a complaint of discrimination or sexual harassment is to be handled.

16. In the summer of 2012, Johnson's son recruited Ericka Richer as an associate. Johnson's son knew Richer through a mutual friend.

17. Richer could not recall at the time of hearing whether she received a copy of Express's employee handbook despite it being their established practice of providing one to every new associate. Express was unable to provide proof of having provided the employee handbook due to Johnson's refusal to go through her files located in the attic of the business.

18. Hughes contacted Johnson during this period and told her that he was looking for a temporary employee interested in residential construction.

19. Richer had earned a two-year degree in construction technology from the Helena College of Technology in May 2012. Richer excelled in her class work and was eager to put her skills and training to use in the "real world." Johnson thought Richer would be an excellent fit for WIM.

20. Johnson contacted Hughes and suggested Richer as a candidate for the temporary assignment. Hughes and Reed met with Richer at a construction job site in July 2012 to discuss her qualifications for the position. The meeting lasted approximately 20 minutes. Hughes and Reed were favorably impressed with Richer's

training and experience. Both men were impressed that Richer drove up to the job site in a large pickup truck with a “Tomboy Construction” decal on the truck.

21. Hughes and Reed agreed that Express would assign Richer to work for WIM. WIM was to be responsible for Richer’s wages and would have the contractual relationship with Express. Reed would be responsible for supervising Richer and approving her time cards, which was not initially provided for under the parties’ written subcontractor agreement. Hughes contacted Johnson and requested Richer be assigned to WIM.

22. On or about August 20, 2012, Richer began her assignment with WIM. Richer reported directly to Reed. Richer enjoyed her assignment and worked closely with Reed. Richer worked with Farrell on a limited basis during this period.

23. Reed spoke with Richer on her first day of work regarding a pair of jeans she was wearing that exposed her thong underwear. Reed felt it was inappropriate for a female employee to be dressed in such a fashion while working on a male dominated construction site. Reed was embarrassed and did not wish for Richer to be embarrassed. Reed had to talk to Richer on other occasions regarding her underwear being exposed while at work. Reed did not have similar conversations with male employees whose underwear may have been exposed while at work.

24. Richer did not report any harassment during the summer of 2012.

25. Richer turned in her time cards to Express and was paid for all time reported on her time cards.

26. Richer signed every time card, except one, between August 2012 and December 30, 2013, without reporting harassment.

27. Hughes paid Richer in cash when she under-reported her hours and was owed overtime.

28. When Hughes greeted Richer at the job site and asked how things were going, Richer always responded, “Good,” and never offered any complaints or concerns.

29. On or about January 9, 2013, WIM laid off Richer for the season. Reed and Hughes had informed Richer at the time of hire that she would be laid off for the season sometime in January depending upon the weather and work load. Richer did

not perform any work for WIM in January and February 2013. Richer understood she would be recalled to work in late February or early March 2013.

30. At the time of Richer's layoff in January 2013, WIM had nine contracts for homes, with the homes at various stages of completion. WIM had closed on 24 residential homes it had built in 2013. WIM had four to seven projects set for the spring and summer.

31. On February 28, 2013, Richer initiated a text message exchange with Farrell. Farrell sent Richer five text messages in response to messages she had sent to him. Richer was annoyed by Farrell's text messages but did not believe Farrell actually held the beliefs espoused in his text messages at the time. Richer subsequently deleted her text messages but kept Farrell's text messages.

32. The first text message Farrell sent at 6:10 p.m. stated: "Are you gonna quit to. PLEEEAAASE!!!!!! Haha." The second text message sent at 6:26 p.m. stated: "Eddie didn't tell u then I didn't (but yes cris Is done) and no you belong in the kitchen and makin baby's women don't belong in MY work force lol." The third text message sent at 6:32 p.m. stated: "Shit how am I out date the older the funner right." The fourth text message sent at 6:33 p.m. stated: "Cris told Eddie today he was workin for art full time." The final text message sent at 6:39 p.m. stated: "Older the berry sweeter the juice haha."

33. Richer did not report the text messages to either Reed or Hughes or to Express. Reed and Hughes were not aware Richer and Farrell were sending text messages to each other during their off hours.

34. Richer conceded at her deposition that the context of her text message exchange with Farrell could be construed as being funny.

35. Farrell testified he intended his text messages to Richer to be a joke. Farrell testified he usually includes "haha" or "LOL" in a text message when he intends for the text message to be a joke. Farrell does not believe women do not belong in the workplace. Farrell met his wife while both were working on a construction project.

36. In March 2013, Richer complained to Reed that she was having a hard time communicating with Farrell and they did not get along with one another. Richer felt Farrell was short and snappy with her. Richer was upset and crying when speaking with Reed. Reed told Richer that Farrell was typically direct and not chatty

while on the job. Reed told Richer to toughen up and show less emotion while dealing with people on the job. Reed also advised Richer to be more receptive to criticism since she was still learning her trade and people like Farrell tended to have knowledge that would prove to be beneficial in the long run. Richer felt Reed was not genuinely interested in resolving the issue because he valued Farrell more than he valued Richer.

37. Farrell is known to criticize an individual's work if it is done incorrectly. Farrell can be difficult to work with at times and can be blunt in his criticisms. Farrell is often short and snappy with other workers and uses coarse language while at work. Farrell treats all workers this way and does not target female employees for this treatment.

38. Reed spoke with Farrell and told him that he needed to try to train Richer and to show her how to do things rather than just doing things himself.

39. Reed had observed Richer was emotional times while on the job. For example, Reed had asked Richer at the end of one work day how she thought she had done that day. Richer became upset when admitting she had made some mistakes that day. On one occasion, Richer became upset when Reed tried to direct her on how to complete a certain task. On another occasion, Richer became upset when Reed talked to her about an issue Hughes had raised about a base trim cut Richer had done incorrectly inside of a house. Neither Reed nor Hughes intended to upset Richer or to "pick on her," but were merely trying to give her instructions that they would give any other employee under similar circumstances.

40. On or about March 21, 2013, Richer and Farrell had another disagreement while on the job. Richer told Farrell to give her a break. Farrell reported the disagreement to Reed via text message that same day. Reed inadvertently sent Richer a text message that was intended for Farrell that stated: "She got a break when she got this job!!!" Reed apologized to Richer after she confronted him about the text message. Reed did not intend the text message to be derogatory or to cause Richer any distress.

41. Between March and June 2013, Richer reported to Reed that Farrell was making her cry.

42. In April 2013, Farrell and Richer were cleaning out storage garages when she joked that it would be fun to "break in" the new houses. Farrell understood Richer's comment to be of a sexual nature. During this period, another employee cut

off the tip of a tube of caulk, which caused the caulk to squirt out next to Richer. Richer commented that the male employee had “cum all over her.” Farrell, Richer, and other employees generally engaged in the same manner of joking while at work.

43. In May 2013, Richer was working at a job site when Matt George, who was a flooring subcontractor on the job, yelled, “Nice ass.” Richer reported the comment to Reed later that evening by text message. Reed told Richer that he would follow up the next day.

44. Reed discussed the situation with Hughes, who was of the opinion that they needed to fire George due to the comment. Reed agreed and was prepared to discharge George the next day.

45. Richer approached Reed the day after she reported George’s comment shortly after Reed had arrived at the job site. Richer met Reed at his vehicle and informed him that she had spoken with George and he had apologized for his behavior. Richer reported she felt the situation had been handled and Reed did not need to do anything. Reed then notified Hughes of what Richer had told them. Reed and Hughes decided not to fire George based upon Richer’s representation that the matter had been handled to her satisfaction. There were no other issues between Richer and George after this incident.

46. On or about June 18, 2013, there was a special event at the Lewis and Clark Fairgrounds in Helena to which Richer, Farrell, Reed, Hughes, and other workers had been invited. Reed sent Richer a text message advising her that Farrell was there due to his concern that the two did not get along. Reed’s text messages also stated: “But the best way to show it don’t bug you is to show it don’t bug you.” Richer sent Reed a text message that stated: “I’m not very good at faking it. I am not like anyone. I am a good person that treats everyone [with] respect and I deserve the same treatment . . . just asking for equality. That’s all I have to say enjoy yourselves.”

47. In the summer of 2013, Farrell called Richer “princess” and asked if she had enough yet. Farrell has called other male employees “princess.” Farrell asked Richer if she had enough yet after experiencing other workers taking a lunch and not returning to work.

48. During this period, Reed directed Richer not to urinate between two job trailers in the driveway of a home that was under construction. Reed was concerned for Richer’s safety and thought it inappropriate for a female to be engaged in such



behavior that could be viewed by other workers, neighbors, and customers. Reed reported the situation to Hughes, who directed Reed to investigate to make sure a clean and usable port-a-potty was available for Richer at the job site. Richer was not disciplined.

49. In August 2013, Richer received a wedding gift from her co-workers, including Farrell, of approximately \$400.00.

50. During this period, Richer accompanied Reed, Farrell, Farrell's wife, and another employee on a boat trip to Canyon Ferry. Everyone drank beer and had fun. At one point, Richer accepted a dare to chase a deer on the shore.

51. In September 2013, Reed called a meeting with Richer and Farrell after growing increasingly frustrated with Richer and Farrell "butting heads" at the job site. Reed told the two to "knock it off" and that their arguing was getting in the way of getting their work done. Richer said she wanted to work as a team and felt she was treated differently because she was a woman. Farrell laughed and said he had met his wife on a construction site. Reed told the two to resolve their issues because it was the last time he would talk to them about the matter.

52. On or about September 12, 2013, Richer had her husband call Reed a few days, because she felt neither Reed nor Farrell were taking her seriously. Richer had not yet shown her husband the text messages she received from Farrell seven months earlier. Richer's husband called Reed and informed him that he was upset with how Farrell treated his wife. Reed gave Richer's husband his perspective and told him that Farrell is very direct and Richer tended to be emotional. Reed told Richer's husband that he thought Richer should toughen up a little bit.

53. Richer's husband also informed Reed during their telephone conversation that he and his wife would not be attending the V.I.P. event for the Helena Parade of Homes due to Farrell being in attendance.

54. On or about October 18, 2013, Richer approached Johnson at Express and told her that she was having "communication issues" with Farrell and found Farrell to be rude. Johnson asked Richer to document her issues so they could be addressed. Richer declined Johnson's offer to talk to Farrell. Richer reported she was happy with the job and was not interested in being placed on a different assignment. Johnson has pulled associates from assignments if they are unhappy or feel they are being treated unfairly. Johnson was prepared to remove Richer from the assignment if she

had asked her to do so. Richer did not report she was being subjected to sexual harassment or discriminatory treatment based upon her gender.

55. In late December 2013, Hughes approached Richer and asked what was going on between her and Farrell. Richer told Hughes that Farrell was short with her and was rude. Hughes told Richer that they would all sit down and talk about it, which they never did.

56. On December 27, 2013, Richer sent Farrell a text message informing him that she was going to do work at the job site that Sunday so he did not have to. Farrell responded via text: "Um no your not cuz that's not how this is gonna work." Richer responded: "I talked to Eddie." Farrell asked when and Richer wrote, "Just now." Farrell responded: "All right," and Richer responded, "I don't care u wanna do it go ahead." Farrell responded: "Just do it I don't care." Farrell was upset because he was looking to earn extra money because his wife had just given birth to their child.

57. On December 30, 2013, Richer confronted Farrell and asked him what his problem with her was. Farrell became angry and swore at Richer. Farrell told Richer to get out of there. Farrell then told Richer that either she went home or he would go home. Farrell then left the job site.

58. Richer returned to Express to complain about her confrontation with Farrell. Richer initially spoke with Erin Eastep because Johnson was leaving the office for the day. Johnson noticed Richer was upset when she returned to her office to retrieve an item. Richer then told Johnson that she did not know what to do due to her difficulties with Farrell. Johnson directed Richer to write a letter outlining her concerns.

59. In December 2013, Hughes experienced a downturn in its buy-sell agreements for homes to be built or finished in 2014. At the end of December 2013, Hughes had one buy-sell agreement, one house that was three-quarters finished, and one foundation spec in the ground.

60. Hughes experienced a 46% decline in sales between 2013 (24 sales closed) and 2014 (13 sales closed).

61. Despite the downturn in business, Reed approached Hughes about doing a limited amount of work through January and February 2014. Farrell's wife recently

had a baby and another temporary employee, Ian Case, was looking for work. The work was offered to Richer, Farrell, and Case. Farrell and Case accepted.

62. Richer worked on December 30 and December 31, 2013. Richer also worked on January 2, 2014. Richer did not work on January 3, 2014 due to inclement weather.

63. On January 3, 2014, Richer gave Eastep her letter outlining her concerns with Farrell, because Johnson was out of the office at the time. The letter was dated January 1, 2014. Richer brought her letter on a USB drive, and used Express's computer to email Johnson a copy and to print out a copy of the letter.

64. Eastep did not give a copy of Richer's letter to either Reed or Hughes or inform either man about the existence of the letter.

65. Richer did not tell either Reed or Hughes about the letter she delivered to Express.

66. Johnson reviewed the letter within a few days after Richer delivered the letter to the office. Johnson did not find the letter alarming and did not inform Hughes of the letter. Johnson knew Hughes was in Arizona during the winter months and did not think the letter was serious enough to send to him.

67. On January 4, 2014, Reed asked Richer to tally her hours and provide them to him.

68. On January 5, 2014, Reed informed Richer via text message that there was no more work.

69. Richer's hourly wage at the end of her employment was \$15.00. Richer had been hired at \$14.00 but received a raise in November 2013 after Reed requested it from Hughes due to Richer's job performance.

70. On January 10, 2014, Reed called Express and informed Eastep that Richer would not be recalled to work for the 2014 construction season.

71. Eastep then contacted Richer and informed her that she was not going to be recalled to work for the 2014 construction season. Richer asked if it was due to the letter she had given to Johnson. Eastep informed Richer that Hughes had not seen the letter.

72. Hughes did not hire a seasonal employee to fill Richer's position.

73. On or about March 8, 2014, Hughes returned from Arizona. Hughes learned of Richer's letter shortly after he returned from Arizona. Reed also learned of Richer's letter during this period.

74. On March 25, 2014, Richer contacted the Human Rights Bureau (HRB) to initiate the complaint process.

75. On April 14, 2014, Richer filed a complaint alleging discrimination and retaliation against BSSH with HRB.

76. On June 17, 2014, Richer filed a complaint alleging discrimination and retaliation against Hughes with HRB.

77. Neither BSSH or Hughes discriminated against Richer by subjecting her to a hostile work environment based upon her gender. Neither BSSH or Hughes subjected Richer to sexual harassment based upon her gender.

78. Neither BSSH or Hughes retaliated against Richer for engaging in protected activity.

79. The decision of BSSH and Hughes to lay off Richer and not recall her to work was due to the downturn in business and not due to Richer's gender or her engaging in protected activity. The reasons offered by BSSH and Mike Hughes for laying off Richer in January 2014 and not recalling her to work was a legitimate, non-discriminatory business decision.

80. Richer has not shown the reasons offered by BSSH and Hughes were pretext for discrimination.

#### IV. OPINION<sup>1</sup>

Richer argues BSSH and Mike Hughes discriminated against her on the basis of gender by subjecting her to a hostile work environment from August 2012 through January 2014 due to the words and actions of Rejus "R.J." Farrell, who was a subcontractor of BSSH at the time of the alleged discrimination.

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<sup>1</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

A. Richer has not shown a prima facie case of sexual harassment.

The Montana Human Rights Act prohibits discrimination in the terms and conditions of employment on the basis of sex. Mont. Code Ann. §§ 49-2-303(1)(a) and 49-3-201. Sexual harassment is considered a form of sex discrimination, and a hostile work environment is one form of illegal sexual harassment. *Beaver v. D.N.R.C.*, ¶29, 2003 MT 287, 318 Mont. 35, 78 P. 3d 857; *Stringer-Altmaier v. Haffner*, ¶20, 2006 MT 129, 138 P.3d 419.

The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988).

To establish a claim of a hostile work environment, Richer must prove (1) she was subjected to verbal or physical conduct of a harassing nature; (2) that it was unwelcome; and (3) that the harassment permeated the work environment to the point that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Stringer-Altmaier* at ¶22; *Nichols v. Azteca Restaurant Ent., Inc.*, 256 F.3d 864, 873 (9<sup>th</sup> Cir. 2001).

A charging party establishes a prima facie case of sexual harassment with proof that she was subject to “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 879 (9<sup>th</sup> Cir. 1991). “Harassment need not be severe and pervasive to impose liability; one or the other will do.” *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7<sup>th</sup> Cir. 2000) (emphasis added, citations omitted).

A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23; see also *Faragher v. Boca Raton*, 524 U.S. 775, 787-88 (1998). The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances. *Oncale*, supra, quoting *Harris*, 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party’s

claim, to assume the perspective of the reasonable victim. It is not necessary that a plaintiff enumerate with precision the exact number of times that she was subjected to offensive conduct in order to demonstrate the pervasiveness required to prove a hostile working environment. Testimony that the plaintiff was subjected to numerous instances of offensive conduct can be sufficient to show that the conduct was pervasive. *Torres v. Pisano*, 116 F.3d 625, 634-635 (2nd Cir.,1997).

However, Title VII does not prohibit “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.” *Oncale*, 523 U.S. at 81 (slip op., at 6). A recurring point in these opinions is that “simple teasing,” offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the “terms and conditions of employment.” *Id.* at 82 (slip op. at 7).

These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a “general civility code.” *Farragher*, 524 U.S. at 778, citations omitted. Properly applied, they will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Id.* “[C]onduct must be extreme to amount to a change in the terms and conditions of employment.” *Id.*

Richer testified Farrell made several unwelcome and offensive comments to her based upon her gender. Richer testified Farrell referred to her as “princess,” sent her text messages stating women did not belong in “his” workforce” and suggesting a woman’s place was in the home “making babies,” and asked her on one occasion if she “had enough.” Richer testified Farrell made other comments but she could not recall with any specificity the comments made, the number of comments, or when the comments were made.

Farrell readily conceded he is short with people at times and is often blunt and direct with people, particularly when correcting someone’s mistakes. Farrell testified he refers to people as “princess” regardless of their gender and never intended the comment to be a slur when used in reference to Richer. Farrell conceded asking Richer if she had enough one day in an effort to check in with her to see if she was okay or was wanting to go home. Farrell also conceded sending the offending text messages to Richer in response to text messages she had sent him but argued they were intended to be jokes as evidenced by the use of “haha” and “LOL.”

The evidence shows the job site was one in which employees joked around with one another and made off color jokes. The evidence also shows the employees were friendly with one another and often socialized with one another outside of

work. Farrell clearly made comments that may be offensive from a female perspective. However, Farrell's comments and actions were not so constant or severe as to change the terms and conditions of the work environment.

Richer argued she felt she was treated differently because she was a woman. A woman working in a male dominated field such as construction can unfortunately expect to run into certain challenges that males may not encounter (such as lack of bathroom facilities). In this case, it was not unreasonable or improper for Reed to request Richer to use a port-a-potty rather than "squatting" between two vehicles in the driveway of a construction project. While a male may be able to find more discrete ways to relieve himself while working, a woman does not enjoy such freedom. Further, it was not unreasonable or improper for Reed to request Richer wear clothing that was less revealing. Unfortunately, a female employee working on an all-male crew may be subjected to treatment that male employees wearing clothing that revealed their undergarments or backside may not be subjected to. Given Richer's relative newness to construction and the realities of working on a male dominated crew, it is understandable that Reed would urge Richer to take certain precautions to protect her safety and her dignity. Finally, Reed urging Richer to "toughen up" may seem paternalistic and condescending. However, most young workers, regardless of their gender or whatever field of work in which they find themselves, can expect to receive similar advice from older and more experienced workers.

Richer's argument that she was subjected to sexual harassment due to the words and actions of Farrell and, in some part, Reed's conduct would require the Hearing Officer to reduce the Montana Human Rights Act to a civility code, which she is not prepared to do. Further, Richer's testimony rang hollow. It makes little sense that a woman genuinely offended by text messages she received in an exchange she initiated would save only the offending text messages rather than the entire chain of text messages. Richer argued her saving only Farrell's text messages was not suspect in light of Farrell deleting the entire chain of text messages. However, Farrell is not the one crying foul based upon the text message exchange. Further, Richer did not report those offending text messages to Express, Reed, or Hughes at or near the time of receipt thereby rendering her subsequent cry of foul inherently suspect. Richer's testimony is less credible than the testimony of Farrell, who described their relationship as playful and joking and punctuated at times with the two "butting heads," which could be expected with two young workers working with minimal oversight.

The Montana Human Rights Act is intended to protect individuals who are subject to severe and offensive conduct that adversely affects an individual's ability to

perform his or her job duties. Richer has failed to show the infrequent and offhanded comments made by Farrell were sufficient to render the working environment hostile. Richer has failed to show a prima facie case of sexual harassment.

B. Richer has not shown a prima facie case of retaliation.

Montana law bans retaliation in employment because of protected activity. Retaliation under Montana law can be found where a person is subjected to discharge, demotion, denial of promotion, or other material adverse employment action after engaging in a protected practice. Admin. R. Mont. 24.9.603 (2). A charging party can prove a claim under the Human Rights Act by proving that (1) the charging party engaged in a protected practice, (2) thereafter the employer took an adverse employment action against the charging party, and (3) a causal link existed between the charging party's protected activities and the employer's actions. *Beaver v. D.N.R.C.*, 2003 MT 287, ¶171, 318 Mont. 35, 78 P.3d 857; see also, Admin. R. Mont. 24.9.610(2). To maintain a retaliation claim, a plaintiff must show retaliation was the "but-for cause" of the adverse employment action. *Univ. of Tex. South Western Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

Circumstantial evidence can provide the basis for making out a prima facie case. Where the prima facie claim is established with circumstantial evidence, the respondent must then produce evidence of legitimate, nondiscriminatory reasons for the challenged action. If the respondent does this, the charging party may demonstrate that the reason offered was mere pretext, by showing the respondent's acts were more likely based on an unlawful motive or with indirect evidence that the explanation for the challenged action is not credible. Admin. R. Mont. 24.9.610 (3) and (4); *Strother v. Southern Cal. Permanente Med. Group, Group*, 79 F.3d 859, 868 (9<sup>th</sup> Cir. 1996).

Richer argues BSSH and Hughes retaliated against her by ending her employment after she reported gender discrimination to Reed and later to Express by laying her off on January 10, 2014 and failing to rehire her for the 2014 construction season.

Substantial and credible evidence shows Richer engaged in protected activity by complaining of her disagreements with Farrell to Reed prior to being laid off on or about January 10, 2014. However, Richer has not shown a causal link between her being laid off and not being recalled to work and the protected practice.



Richer was a temporary employee whose assignment was always contingent upon the business needs of Hughes. Richer was aware Hughes would be laying her off in January 2014 based upon her experience in 2013 and the simple fact that residential construction usually slows, if not stops altogether, during the winter months. Richer, Farrell, and temporary worker Ian Case were all given the opportunity to perform a limited amount of work in January and February 2014. Richer declined this opportunity. Substantial and credible evidence shows neither Hughes nor BSSH hired another temporary worker for Richer's position when work resumed in March 2014. Richer has failed to show a prima facie case of retaliation.

Even if one was to find Richer had shown a prima facie case of retaliation, Hughes and BSSH offered substantial and credible evidence showing a legitimate, non-discriminatory reason for their decision to lay off Richer and not recall her to work. Hughes testified credibly that he had experienced a significant decline in the number of closed sales at the end of 2013 when compared to the number of closed sales it had at the end of 2012. Reed testified he decided to be more "hands on" and returned to performing more of the work on the projects BSSH had through Hughes, in part, due to the day care needs of his growing family. Reed testified his wife took over the administrative duties required to run a small business, which left him free to return to working more on the job.

Given the detailed and credible evidence presented by Hughes and Reed regarding their respective financial conditions at the end of the 2013 construction season, BSSH and Hughes have shown a legitimate, non-discriminatory reason for laying Richer off and not recalling her to work. Richer failed to show the proffered reasons for laying her off in January 2014 and not recalling her to work in March 2014 were merely pretext for a discriminatory motive. Therefore, Richer has failed to show BSSH and Hughes retaliated against her for protected activity.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. Ericka Richer failed to prove that Mike Hughes and Big Sky Siding and Homes discriminated against her by subjecting her to a hostile work environment based upon her gender and retaliated against her for protected activity. Mont. Code Ann. §§ 49-2-303(1) and 301.

3. For purposes of Mont. Code Ann. § 49-2-505(8), Mike Hughes and Big Sky Siding and Homes are the prevailing parties.

VI. ORDER

Judgment is granted in favor of Mike Hughes and Big Sky Siding and Homes and against Ericka Richer. Richer's complaint is dismissed with prejudice as lacking merit.

DATED: This 28th day of July, 2015.

/s/ CAROLINE A. HOLIEN

Caroline A. Holien, Hearing Officer  
Office of Administrative Hearings,  
Montana Department of Labor and Industry

\* \* \* \* \*

## NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Ericka Richer, Charging Party, and her attorneys, Hollie Lund and Tara Harris, Adaptive Law Firm, PLLC; and Big Sky Siding and Homes, and Mike Hughes, Respondents, and their attorney, Michael Green and Christopher K Oliveira, Crowley Fleck PLLP:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)©.

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission  
c/o Marieke Beck  
Human Rights Bureau  
Department of Labor and Industry  
P.O. Box 1728  
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal. The appealing party or parties must then arrange for the preparation of the transcript of the hearing at their expense. Contact Annah Howard, (406) 444-4356 immediately to arrange for transcription of the record.

RICHER.HOD.CHD